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No. 95-1595

In The

Supreme Court of the United States

October Term, 1995

BRUCE BABBITT, Secretary of the Interior, et al.,
Petitioners,

v.

MARVIN K. YOUPEE, SR., et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENTS

RENE A. MARTELL
Counsel of Record

DANIEL L. MINNIS
D. MICHAEL EAKIN
Montana Legal Services
P.O. Box 409
Poplar, MT 59255
(406) 768-3006

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. 2206, violate the Fifth Amendment because it does not provide for compensation to the estate of the decedent for the land it declares to escheat.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the petition for certiorari, Williamette Y. Brussard and Darlan D. Youpee were parties to the District Court and Court of Appeals actions. Petitioner, Secretary of the Interior, was the defendant/appellant in the courts below. Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, and Helen Youpee-Ricker were plaintiffs/appellees in the courts below.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or be deprived of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Petitioner's Statement presents an adequate history of the Indian Land Consolidation Act (ILCA) up through this Court's decision in *Hodel v. Irving*, 481 U.S. 704 (1987). Pet. Brief at 3-10.

The decedent, William Youpee, died testate on October 19, 1990. He was assisted in drafting his will by the Realty Officer of the Bureau of Indian Affairs area office in Billings, Montana. (Affidavit to accompany Indian Wills, District Court, Administrative Record, Docket No. 13.) He was an enrolled member of the Fort Peck Tribes and owned undivided fractional interests in allotted trust land on Fort Peck, Standing Rock and Devil's Lake Sioux Reservations. Youpee intended to leave his interests to his children, the natural objects of his affections. He did so in a manner that did not cause further fractionalization of his interests in these lands. Despite his efforts to provide for his children, thirty-four parcels of the land and mineral interests that he devised escheated under amended Section 207.

The devisees of these interests filed suit on February 3, 1993, in the district court alleging that the ILCA, as amended, violates the Takings Clause of the Fifth

Amendment to the United States Constitution. C.A. Excerpts of Record (E.R.) 3-4. These plaintiffs also argued that the Department of the Interior, as trustee for the decedent, had failed to advise him that his land as devised would escheat to tribes. E.R. 5. The court held that the ILCA as amended violates the Just Compensation Clause for those property owners who are not legally capable of devising property or who do not have an heir who possesses an undivided interest in the escheatable property. Pet. App. 23a.

The court of appeals affirmed, holding that amended ILCA restricts devise and descent of land by Indian landowners who do not have an heir who owns a share in the parcel and that the statute continues to completely abolish one of the sticks in the bundle of rights for a class of Indian landowners. In addition, the court held that amended Section 207 is an extraordinary and impermissible regulation of Indian lands and effects an unconstitutional taking without just compensation.

SUMMARY OF ARGUMENT

This Court found the Indian Land Consolidation Act unconstitutional in *Hodel*. The Act was amended prior to the decision in *Hodel*, but the constitutionality of the amended Act was not an issue before the *Hodel* Court and the Court left that question unanswered. *Hodel* at n.1. Despite the amendments to the act, constitutional problems remain.

The amended Act still fails to provide compensation for the interests taken. The Secretary suggests that

amended Section 207 solves the problem because the takings are *de minimis*. In *Hodel* this court found the takings of lesser valued interests not to be *de minimis*. The problem remains.

The amendments also permit an Indian who owns an escheatable interest to pass that interest to an heir who already owns an interest in the same allotment. This does not solve the takings problem because it denies the Indian the ability to leave land to his lineal descendants.

The amendments to the Act do not change the ability of incompetent Indians or those under the age of 18 to prevent the escheat. There is the same taking from this class as presented in *Hodel*.

In addition, amended Section 207, as written and as implemented, violates the Due Process Clause of the Fifth Amendment. As in the original Act, the 1984 amendments take immediate effect upon enactment. Indian landowners are not provided notice of the escheat, nor are they given a grace period within which to act to avoid the escheat. Due process requires such notice because of the pervasive control over Indian wills and estates.

ARGUMENT

Fractionated land interests are a serious problem. Although the solution to such a problem may require a dramatic action to encourage consolidation, *Hodel*, 481 U.S. at 712, that remedy must remain within the bounds of the Constitution. This Court in *Hodel* decided that Section 207 of the ILCA violates the Takings Clause of the

Fifth Amendment. This court need only consider whether the amendments cure the constitutional problems noted by this Court in *Hodel*. If those problems remain, the Act, even as amended, remains unconstitutional.

I. THE PROBLEMS NOTED IN *HODEL* ARE NOT CURED.

A. The value of the land taken is not *de minimis*.

The value of ILCA escheated land is not *de minimis*. In *Hodel* this Court considered the value of the land, not the income generated from the land, when it determined that the taking of 2% parcels was not *de minimis*. 481 U.S. at 714. The amendments, passed before this Court's *Hodel* decision, still focused on the income generated from the property rather than on the value of the property itself. Had Congress had the benefit of this Court's decision it could have addressed the problems that this Court would find. As the law now stands, the same constitutional problem persists.

The Secretary makes the same *de minimis* argument this Court rejected in *Hodel*, again arguing the *de minimis* value of income generated rather then the value of the property taken. The value of Youpee's escheated land is approximately $2,100.00, an amount greater than the escheated portions of two of the three estates considered in *Hodel*. Two thousand dollars is not a trivial sum. Such a sum has an even greater significance in a Montana county

which ranked fifty-sixth of fifty-six in per capita income in the year of the taking.[1]

The focus on the income generated does not reflect the true value of the taking. Some of the escheated interests in this case were mineral interests. Unexploited mineral interests can be valuable yet generate no income until the minerals are extracted. Many Indian lands have valuable timber.[2] Timber can be harvested about once each generation. The value of harvestable timber is not reflected when considering only income generated in the last five years. While expanding the time within which land could earn a set amount solves a portion of the problem, it does not eliminate the takings of valuable interests.

Even if this Court decides that the value of the land is *de minimis*, *de minimis* takings are takings nonetheless. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982). The takings problem can be solved by paying the *de minimis* value for the *de minimis* taking.

B. *Inter vivos* transfers do not cure the taking.

This Court has already decided that the possibility of "complex *inter vivos* transactions" do not cure the takings problem. *Hodel*, 481 U.S. at 716. Rather than accept the

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[1] Regional Economic Information System, Bureau of Economic Analysis, U.S. Dept. of Commerce, released June 4, 1996.

[2] The Ft. Peck Allotment Act, 30 Stat. 558, provides that each allottee will receive not less than 2.5 acres nor more than 20 acres of timber land.

Hodel decision, the Secretary chooses to argue about the adjective "complex," arguing that "simple" *inter vivos* transfers can prevent a taking. (See Pet. Brief at pp. 28-34). Such transfers are complex because they are difficult to understand. The average landowner knows what a will is but does not know what an *inter vivos* trust is. The Secretary is mandated to assist in the preparations of Indian wills. 43 C.F.R. § 4.260 (1995). There is no mandate that the Secretary assist in the preparation of *inter vivos* transactions. Whether such transfers are "complex" or "simple" does not matter. This Court has already decided that such transactions are "not an adequate substitute for the rights taken." *Hodel* at 716.

The Secretary acknowledges that all transfers of trust land must be approved by the Secretary. (See Pet. Brief at p. 28 n.12). Such action by the Secretary is discretionary. 25 C.F.R. § 152.17 (1995). Approval of *inter vivos* transfers could require the Secretary to exercise his discretion in a manner contrary to the expressed Congressional policy of encouraging land consolidation. It would also require the Secretary to act contrary to the interest of the tribes for whom he serves as trustee. The suggestion that the Secretary would readily approve such transactions is speculative at best.

The suggestion of transfer by revocable trust is impractical. Already the United States serves as trustee for the lands held in trust. The establishment of an *inter vivos* trust creates a trust within a trust. It is doubtful that a beneficiary of a trust can place the corpus of the trust in yet another trust.

Even if there are methods to transfer land during a person's lifetime, if the land is taken upon the person's death, there is still a taking. The Fifth Amendment requires compensation for that taking.

C. The amended Act does not permit the landowner to leave his land to an heir.

As noted in *Hodel*, the right to leave property to heirs is a time honored tradition. " . . . In one form or another, the right to pass on property – to one's family in particular – has been a part of the Anglo-American legal system since feudal times." 481 U.S. at 716. The Court found a property interest in one's right to devise, at least in part, because of this tradition. The amended Act continues to prevent the testator from leaving property to his heirs, as did the original Act. As the Ninth Circuit noted, "the amended ILCA continues to completely abrogate both the descent and devise of land to an heir by owners such as Mr. Youpee who do not have an heir who possesses an undivided interest." *Youpee v. Babbitt*, 67 F.3d 194, 199 (9th Cir. 1995). This Court has recognized certain liberty interests in family relations that are protected by the Due Process Clause of the Fifth Amendment. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). One such protected family interest is the right to provide for one's children by devise or descent. While not expressing the right in these terms, the Court in *Hodel* noted that the abrogation of the right "goes too far." The ILCA which abolishes descent entirely and generally

limits devise to collateral relatives violates this liberty interest.

The Secretary argues that the sovereign has a right to regulate or even abolish descent and distribution, citing *Jefferson v. Fink*, 247 U.S. 288 (1918), *Irving Trust Co. v. Day*, 314 U.S. 556 (1942), and the Uniform Probate Code. (Pet. Brief at p. 37). The argument is unpersuasive.

The issue in *Jefferson* was choice of law. The dispute arose when an allottee died in 1908 without spouse or issue, but with collateral heirs. Congress had statutorily changed the intestacy law of the Indian Territory from incorporating the law of Arkansas to incorporating the law of Oklahoma. There was no taking in *Jefferson*; the property still went to his heirs. Thus, *Jefferson* does not advance the Secretary's theory that the sovereign's right to determine descent and devise is bound only by the extent of Congress' plenary power.

Irving Trust implies that the Constitution does not prohibit the abolition of the power to devise. However, the facts arose in the context of a wife taking an elective share after signing a prenuptial agreement. The issue decided was an impairment of contract issue, not a Takings Clause issue. While *Irving Trust* does discuss the state's power in regulating devise, it did not address whether a state could abolish devise and descent. In *Irving Trust*, the state had only limited devise by requiring certain formalities for a prenuptial contract waiving a spouse's elective share. The Court upheld the procedural requirements of a state statute that mandated protection of the family.

The Secretary also cites *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898); *United States v. Perkins*, 163 U.S. 625, 628 (1896); *Mager v. Grim*, 49 U.S. (8 How.) 490, 493 (1850); *United States v. Fox*, 94 U.S. 315, 320 (1876); *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874). These decisions amount to constitutional regulation of one's right to descent and distribution because they seek to limit not eliminate that right. Specifically *Mager*, *Magoun* and *Perkins* investigate the constitutionality of inheritance taxes; *Randall* involves divestiture of a property right wrongly obtained and *Fox* divests property wrongfully bequeathed by a corporation instead of a natural person. Each case holds that the right to take property by descent or devise is a privilege not a right and as a result is subject to conditions. *See e.g., Magoun*, 170 U.S. at 288. The legitimacy of the argument advanced by these cases notwithstanding, this Court in *Hodel* has decided that when the character of these conditions becomes extraordinary, an unconstitutional taking results. The cases the government cites involve factual patterns in which the character of the taking is not extraordinary; that is, there is no elimination or even severe limitation of a property right. The amended Act in this case is different, the right of descent is eliminated and the right to devise is either severely curtailed or eliminated altogether.

The Uniform Probate Code and other forced heir statutes require some property (usually a portion of the estate) descend to a decedent's immediate family. It is done for the protection of the family. The case at bar differs. Here the statute does not attempt to require that certain property or amounts of property be left to the

family. Instead it seeks to force an escheat of land. To force a decedent to provide for his family merely seeks to regulate the process in a manner that could be considered constitutional. The amended Act, on the other hand, seeks to force an escheat because it limits heirs except for a few collateral heirs who might be difficult if not impossible to locate.

In addition, when the amended statute forces an escheat, it does so with the decedent's real property. The forced heir statutes, on the other hand, can be satisfied with a testamentary distribution of personal property. This Court indicates that an owner's expectations concerning the nature of his interests may be dependent upon the category of that property. Therefore, land and rights that are taken pursuant to Government regulation may warrant different treatment depending upon whether the property to be regulated is real or personal. Real property should be afforded more protection because an owner would reasonably expect it. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024-1025 (1992). The decedent's interest to his land requires more protection from divestiture than title to his personal property.

While the forced escheat provisions of the Uniform Probate Code appear to pass Fifth Amendment muster, the ILCA cannot be seen in the same light. An escheat pursuant to the intestate provisions of the Uniform Probate Code occurs after no lineal and collateral heirs are found. Such an investigation is irrelevant under the ILCA. Escheat occurs whether or not lineal or collateral heirs are found. The forced escheat of the Uniform Probate Code represent a legitimate regulation of the process

because it encourages finding an heir. The ILCA fails to meet this test because it discourages or renders impossible finding an heir.

D. The Act continues to completely abrogate the right to descent for a class of Indians.

The amendments affect only those who are over eighteen years old and competent. If a decedent does not fall into this category, the amended Act is no different than the original Act. Such decedent is still precluded entirely from passing 2% land. 25 U.S.C. 373. Descent is barred even if the descent would consolidate landholdings or at the very minimum, would not further fractionate the tract. The amended Act remains unconstitutional.[3]

II. THE AMENDED ACT TAKES INDIVIDUAL PROPERTY INTERESTS WITHOUT PROVIDING JUST COMPENSATION.

The escheat provision of the amended Act results in an actual physical taking of the real property. This is not a mere regulatory taking in which the owner remains in possession but has limited use of his property. However,

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[3] The Government has contested Youpee's standing to assert the claims of incompetent Indians and those under the age of 18. This Court has already determined in *Hodel* that those in the Youpee's position have standing to assert their decedent's claim. The Court should find standing for Youpee to assert the claims of these other groups pursuant to the prudential concerns outlined by the Court in *Craig v. Boren*, 429 U.S. 190, *reh. den.*, 429 U.S. 1124 (1976).

even if a regulatory analysis were considered, the amended Act still results in an unconstitutional taking.

The Court in *Lucas* lays out the current status of regulatory takings jurisprudence. It identifies the categorical takings and the inquiries to determine regulatory takings. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1013 (1992).

A per se regulatory taking occurs when the regulation compels the property owner to suffer a physical invasion.[4] *Id.* The second occurs when the regulation denies all economically beneficial use of the land.[5] *Id.* When neither of these categorical treatments apply, then the law of *Pennsylvania Coal v. Mahon* applies; that is, " . . . that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). Over the years the Court has developed a factual inquiry to employ to determine how far is "too far". That test is found in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, (1979).

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[4] *Loretto v. Teleprompter Manhattan CATV Corp., supra; United States v. Causby*, 328 U.S. 256 (1946).

[5] *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 2141 (1980), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987).

A. The effects of the amended Act amount to a categorical taking.

Amended Section 207 amounts to a permanent invasion of Youpee's property rights. This case can be analogized to *United States v. Causby*, 328 U.S. 256 (1946). In *Causby*, a property owner operated a chicken farm on land adjacent to an airport which became a frequent landing spot for United States airplanes. Noise from the airplanes rendered the property valueless as a chicken farm because the noise caused the chickens to fly into the walls of the coop and kill themselves. The Court held that the owner's property interest extended to the "immediate reaches" of air space above his property, and when the Government physically invades that space and that invasion renders the land useless, the loss is complete and a taking results. *Causby*, 328 U.S. at 265. The Court found that the physical invasion of one property right ("immediate reaches") which rendered another property right (use of surface) valueless was sufficient to find a categorical taking.

In this case, the Government invades one property right (right to descent and right to devise) which renders another property right (right to know that the heirs will have use and enjoyment of the escheated parcel) valueless. Therefore, this Court should find that the amended Act amounts to a per se taking.

Andrus v. Allard, 444 U.S. 51 (1979) offers no solace to the Secretary. *Allard* indicates that regulating a property owner out of one right attached to that property may not amount to a physical invasion. In that case, the Court decided whether the regulation of an Indian owner's

right to transfer eagle feathers by prohibiting their sale was a taking. The Court decided that there was no taking because the Indian owner retained possession and the right to transfer the ceremonial feathers by methods other than sale. Crucial to the Court's reasoning was the owner's retention of the " . . . right to possess, transport, . . . and to donate or *devise* . . . " the feathers. *Id.* at 66 [emphasis added]. Because he retained those rights, his possession and that of his heirs was assured.

The amended Act denies the right to transfer by devise to a large class of persons and by descent to all. Thus, reliance on *Allard* is misplaced because *Allard* did not result in loss of property. Unlike *Allard,* there is a taking of property under the amended Act.

B. Loss of the right to descent and restriction on the right to devise goes too far and results in a taking without compensation.

Even if the Court finds that there was no physical invasion, the effects of the amended Act should amount to a taking because the regulation "goes too far". *Penn Central Transportation Company v. New York City, supra.* No set formula exists to determine in all cases whether compensation is constitutionally due for a Government restriction of property. *Id.* Ordinarily the Court must engage in ad hoc inquiries. *Id.* This Court has looked to the character of the Government taking, *Hodel,* and the

degree of interference in investment backed expectations. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979).[6]

The Court should consider two aspects of the character of the taking. The average reciprocity of advantage is the first aspect. In this case, there is no reciprocity of advantage. William Youpee was, and his children are, enrolled on the Fort Peck Reservation in Montana. Many of the escheated parcels are on the Standing Rock and Devil's Lake Reservations in North and South Dakota. Youpee's heirs will not share in the advantage of those Tribes having an increased land base. There is no reciprocity of advantage when the land and minerals escheat to a foreign reservation.

In *Hodel* this Court weighed the reciprocity of benefits and concluded that they weighed weakly in favor of the statute's constitutionality. Despite that result, the Court decided that elimination of the right to descent and devise made the character of the act "extraordinary" thus resulting in a taking. This reasoning most closely resembles the categorical approach taken in *Lucas.* When the character of the taking is such that a property right is eliminated, a taking results even if benefits and burdens weigh in favor of the statute.

The character of the Government act remains "extraordinary" as it did in *Hodel.* It remains so because a

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[6] Youpee defers to the decision in *Hodel* that the decedent's investment backed expectations " . . . is dubious." *Hodel,* 481 U.S. at 715. Youpee will note, however, that at one point the mineral estates were reserved on several parcels when the surface was conveyed. The minerals were viewed as an investment.

property right is eliminated. The right to devise has been severely curtailed to the point of *de facto* elimination, and the right to descent has been eliminated altogether. In addition, for the class of Indians under 18 years of age and incompetents, the character of the taking is the same as in *Hodel;* that is, the right to descent is eliminated. Thus, the character of the taking for most differs little from what it was in *Hodel* and for those 18 or under or incompetent it remains the same.

The Secretary argues the fact that the amended Act continues to promote the common good to those who also must bear its costs cuts in favor of its constitutionality. (Pet. Brief at p. 27). But the fact that the Government is acting to promote the common good for all does not establish or even strongly suggest that no taking has occurred. Although the Government must be acting to promote the common good to meet the public use test, a compensable taking plainly can occur even if the public use test is satisfied. For example, when the Government formally exercises its eminent domain power to take one's land for a public park, the Government is acting to promote the common good. Similarly, the Government was acting to promote the common good when it sought to acquire a public beach access easement in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), when it sought to save public money in *Lynch v. United States,* 292 U.S. 571 (1934) and when it sought to provide public disclosure of health and safety data regarding pesticides in *Ruckleshaus v. Monsanto,* 467 U.S. 986 (1984). Yet in each case the Court found a taking. One cannot distinguish a compensable taking from a noncompensable regulation of property simply by asking whether the Government was

acting to promote the common good. A. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I – A Critique of Current Takings Clause Doctrine,* 77 Cal. L. Rev. 1299, 1357-58 (Dec. 1989).

The question in this case is whether Congress' desire to promote the common good by correcting the bad results of the allotment process should be borne by all taxpayers or whether it can instead be imposed entirely on the owners of these fractionated shares. If there was sufficient average reciprocity of advantage to these allottees, then the amended Act may lean to constitutionality.

The average reciprocity of advantage remains weak. In the unpublished district court opinion that begot *Hodel,* Chief Judge Bogue remarked on the taking as follows:

> The argument that this result will benefit the Indian population as a whole is simply not valid in this Court's experience. The benefits derived form these lands do not filter down to the vast majority of the Indian people on the Pine Ridge Indian Reservation. In this respect, the system is not functioning as contemplated. Congress would be well-advised to examine closely the practical effect of legislation such as 25 U.S.C. 2206.

Irving v. Watt, No. 83-5139 (D.S.D. Sept. 15, 1983), 11 Ind. Law Rep. 3009, 3010 at n.2.

The same observation applies on the Fort Peck Reservation. For the Tribes to accrue a greater land base in this impoverished area is of no direct personal benefit to individual Indians. Roosevelt County, which comprises the majority of the Fort Peck Reservation is among the

poorest counties in Montana. (Regional Economic Information System, Bureau of Economic Analysis, U.S. Dept. of Commerce, released June 4, 1996, citing for the period of 1989-94.)

Fractionated tracts do not contribute to the poverty situation on the Fort Peck Reservation. Seventy-seven per cent of the tracts on Fort Peck are not severely fractionated. (Pet. Brief at 18 n.9). While increasing the tribal interests in fractionated lands may benefit the Tribes, it does not benefit the individual tribal member. The conveyance of the assets to their government is not going to trickle down as an economic benefit to the vast majority of the Indian people on the Fort Peck Reservation. Just because land is held in communal ownership "does not mean that each member had such an interest, as a tenant in common, that he could claim a *pro rata* proportion of the proceeds. . . . " *The Cherokee Trust Funds*, 117 U.S. 288 at 308 (1886).

III. YOUPEE'S RIGHT TO THE DESCENT OF HIS ALLOTMENT IS VESTED.

Even if the right of devise and descent can be limited in the abstract, the right cannot be taken without compensation if it was specifically provided for in negotiated agreements. Youpee's right to descent is contractually vested. Contractual vestment occurred when the language of treaties or allotment acts expressly gave an allottee the right of descent in consideration for his interest in communal land. Contractual vestment occurred implicitly as one stick of the bundle of sticks conveyed

with the individual allotment. A contractual right of descent cannot be altered without giving compensation.

A. Standing Rock and Devil's Lake specific allotment acts expressly provide for the right of descent.

Youpee owned an undivided interest in 14 parcels subject to escheat located on the Standing Rock Reservation valued at $1,239.34. He also owned 5 parcels subject to escheat located on the Devil's Lake Reservation valued at $178.65. The creation of those Reservations guaranteed the right of descent.

By treaty in 1867, some members of the Sisseton, Wahpeton and Cut-Head bands of Sioux were placed on a reservation at Devil's Lake at Fort Totten, Dakota Territory. In the creation of this reservation, it was agreed that land would be allotted in 80-acre parcels with descent to the allottee's heirs. Specifically, the treaty provided, " . . . said lands and the improvements thereon shall descend to the proper heirs of the persons obtaining a patent." Treaty with the Sioux-Sisseton and Wahpeton Bands, 1867, Art. 5, 18 Stat. 505 (1867).

The Standing Rock Reservation was formed pursuant to the Act of March 2, 1889, 25 Stat. 888. That Act divided the Great Sioux Reservation into several smaller reservations. One of them was the Standing Rock Reservation in the Dakota Territory. *Id.* at §§ 3 & 4. All Indians on the Great Sioux Reservation, in consideration for receiving their individual allotments, relinquished title to land on any reservation other than the one assigned to their band. *Id.* at § 16. The agreement also promised allottees the

right to descent according to the laws in force in the State or Territory in which the lands were situated. *Id.* at § 11.[7]

The contract language in these allotment acts is specific. Allottees had to relinquish their rights to the tribal land and to land they held on other reservations. In return, allottees received their Standing Rock and Devil's Lake allotments with the right to descent. The contractual right to descent cannot be abrogated without compensation.

B. The Fort Peck allotments are contractually based.

Fifteen of the thirty-four escheated parcels lay within the boundaries of the Fort Peck Indian Reservation. The Fort Peck Allotment Act does not specifically speak to negotiated exchanges of land for allotments, Act of May 30, 1908, 35 Stat. 558, but the Act's Senate and House Reports do. H.R. 1507, 60th Congress, 1st Session, Vol. 2 Misc. 1907-1908; S.R. 202, 60th Congress 1st Session.[8] That

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[7] The Act reads: "That the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto after patents therefor have been executed and delivered . . . "

[8] The Senate Report reads: " . . . After several days' counsel with the Indians about 95 per cent of the adult members of the tribe agreed on a plan for the allotment of the land and sale of excess lands under the supervision of the Government."

The House Report reads: " . . . After several days' council (sic) with the Indians about 95 per cent of the adult members of the tribe entered into a written contract agreeing on a plan for the allotment of the lands and the sale of the excess lands under the supervision of the Government."

Act allots the tribal land in accordance with the allotment laws of the United States. The General Allotment Act provides for descent in accordance with the laws of the state or territory in which the allotment is situated. 25 U.S.C. 348. Because the Senate and House Reports provide evidence that contracts were struck between the Tribes and the Government, the Court should conclude that the allotments and the property rights that accompanied them were contractually guaranteed.

Even for those reservations where there is no specific contract for allotments, the right of descent is present since allotment acts are to be read in *pari materia*. *United States v. Jackson*, 280 U.S.183, 196 (1930); *CIR v. Stevens*, 452 F.2d 741 (1971). Individual Indian lands held in trust by the United States should receive like legal treatment regardless of statutory origin. Felix Cohen, *Handbook of Federal Indian Law* 618 (1982). Since there is express language guaranteeing the right of descent in some specific allotment acts,[9] the right attaches to all Indian land.

The individual Indians who negotiated with the government for allotments contracted for more than mere life estates. Part of the bundle of sticks for which they negotiated was that they and their heirs would own the land in perpetuity. In interpreting the various allotment acts, the Court should also be guided by that "eminently sound

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[9] See Act of May 1, 1888, 25 Stat. 113; *Choate v. Trapp*, 224 U.S. 664, 667 (1911) (description of Atoka Agreement); *Moore v. Carter Oil Co.*, 43 F.2d 322 (10th Cir 1930), *cert. den.*, 281 U.S. 903, Agreement with Seminole Nation, 30 Stat. 567; *United States v. Ft. Smith & W.R. Co.*, 195 F. 211 (8th Cir. 1912); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867).

and vital canon" that treaties and statutes dealing with Indians "are to be liberally construed and all doubts resolved in their favor." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 at 655, n.2 (1976). To construe the various allotment acts and treaties as allowing land to escheat violates this canon.

C. Rights in allotments are vested.

Undoubtedly, Congress can abrogate the various treaties with the tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). But there is a limit to this power. Congress cannot rely on that power to take vested rights. In the case of allotments, the rights in the property vested when the allotment was assigned to an individual Indian. At that point Congress could not "take away property already acquired under operation of the [contract] or to deprive [the entity] of the fruits actually reduced to possession of contracts lawfully made." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 at 55 (1986), quoting, *Sinking Fund Cases*, 99 U.S. (9 Otto) 700, 720 (1896).

If the United States expressly provides for something in a contract, a taking will occur if the Government reneges on that commitment. In *Monsanto* for example, the Court found a taking when the Government violated its "explicit guarantee" on nondisclosure. *Ruckelshaus v. Monsanto, supra*. In *Lynch v. United States, supra*, the Court held that a taking occurred when Congress enacted a law repudiating disability and life insurance contracts that the Government had issued to veterans under the War Risk Insurance Act. The Court stated that the policy

holders had acquired "vested rights" not mere gratuities that could be redistributed or withdrawn at any time in the discretion of Congress.

Subsequent to *Lynch* the Court explained that it was wrong of the Government to seek to renege on its commitment solely to save money. *See, e.g., Bowen*, 477 U.S. at 55, (citing *Lynch* for the proposition that Congress may not repudiate its own debts, which constitute property to the lender, simply in order to save money); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 n.25 (1977) (citing *Lynch* for the proposition that the "need for money is no excuse for repudiating contractual obligations"). A. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 Calif. L. Rev. at 1349.

Although a bit more distant in time, this Court has applied the same principles to Indian allotments. The allotment of land pursuant to statute operates to vest an allottee with the land and the property rights associated with the land, and Congress cannot abrogate that right without triggering the Fifth Amendment. *English v. Richardson*, 224 U.S. 680 (1912); *Carpenter v. Shaw*, 280 U.S. 363 (1929); *Choate v. Trapp*, 224 U.S. 665 (1912); *Ward v. Love County*, 253 U.S. 17, 21 (1920); *United States v. Chase*, 245 U.S. 89 (1917); *see also*, Felix Cohen, *Handbook of Federal Indian Law* 606 (1982). The allotment acts are such statutes. The conclusion is clear. Property rights acquired by statute vest.

Choate is the most analogous. There the Government had negotiated an agreement in which lands held by the Indians would be non-taxable for a period of twenty-five years. Congress subsequently removed the restriction

prior to the expiration of the statutory period. This court found a taking, noting:

> . . . for although the Atoka Agreement is in the form of a contract, it is still an integral part of the Curtis Act, and if not a treaty, is a public law and as such was amendable and repealable at the will of Congress. But there is broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. (citation omitted). The question in this case is not whether the plaintiffs were parties to the Atoka Agreement, but whether they had acquired rights under the Curtis Act which are now protected by the United States . . .

Choate, 224 U.S. at 568.

In *Choate* this Court found that the individual allotees had acquired such rights. Here, Youpee acquired rights to have his property descend to his children.

The right of descent was included in the purpose of the allotment acts and was part of the bundle of sticks. "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries and force the assimilation of Indians into the society at large." *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 at 254 (1992). If Congress wanted Indians to adopt "American ways" by enactment of allotment acts, then it must have intended to transfer traditional property rights when it allotted land pursuant to the allotment acts. Thus, to the extent this Court in *Hodel* defined traditional property rights to include the right to devise and the right of descent, then

one of the property rights granted to Indians by the allotment acts is the right of descent, and it should be respected to the same extent as other traditional property rights.

Youpee recognizes that not all statutory entitlements are vested rights. *E.g., Bowen, supra.* However, the Government has the power to enter into contracts that confer vested rights and with it the duty to honor those rights. *Id.*; *Perry v. United States*, 294 U.S. 330, 350-354 (1935); *Lynch v. United States*, 292 U.S. 571 (1934); *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923).

In the area of Indian allotments, Congress can reallocate future interests in Indian land without causing a taking. *Gritts v. Fisher*, 224 U.S. 640 (1912); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *United States v. Jim*, 409 U.S. 80, *reh. den.*, 409 U.S. 1118 (1972). However, these cases all dealt with situations in which the property interest had yet to vest. Once the land is vested in the allottee, rights to the land cannot be taken without compensation. *Choate, supra; Carpenter v. Shaw, supra.*

IV. AMENDED SECTION 207 VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Youpee was assisted in drafting his will by the Realty Officer in the BIA area office in 1981, prior to the ILCA. The will required the approval of and was retained by the BIA. (C.A. E.R. p. 10). After the passage of both the ILCA in 1983 and the amendments to the ILCA in 1984, the BIA never notified Youpee that his will was no longer valid as to his devise of 34 parcels. (C.A. E.R. pg. 5). The BIA

violated its fiduciary duty to Youpee when it failed to notify him of the deficiencies in his will because of the impact of the ILCA.

The concept of a federal trust responsibility to Indians has evolved judicially to become one of the primary cornerstones of Indian law. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Creek Nation*, 295 U.S. 103 (1935). The federal trust responsibility applies to individual Indians as well as the tribal entity. *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866).

While the trust responsibility does not attach to every action taken by the Government, *United States v. Mitchell*, 445 U.S. 535 (1980), it does attach when the Government acts so as to completely fill the field. *United States v. Mitchell*, 463 U.S. 206 (1983). The Government action in the field of Indian wills and estates is pervasive. It drafts the wills, retains possession of the wills, approves the wills and probates the estates. Thus, the Government had a responsibility to Youpee to notify him of the effects of the ILCA.

The responsibility to notify Youpee rises to a constitutional level when Government action can cause a property owner to lose his property. *Lambert v. California*, 355 U.S. 225 at 228 (1957); *see also, Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (Brennan dissenting). Youpee was constitutionally entitled to notice that his land would escheat and what actions he could take to avoid the escheat.

While elimination of these fractionated parcels is the goal of the ILCA, the BIA has allowed this result to be

achieved by violating its trust responsibility to allottees and its constitutional duty to provide notice of the potential escheat.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RENE A. MARTELL
Counsel of Record

DANIEL L. MINNIS
D. MICHAEL EAKIN
Montana Legal Services
P.O. Box 409
Poplar, MT 59255
(406) 768-3006

Attorneys for Respondents

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